

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

| | | |
|--------------------------------------|---|------------------|
| FIBER TECHNOLOGIES NETWORKS, LLC, |) | |
| f/k/a FIBER SYSTEMS, LLC, |) | |
| |) | |
| v. |) | |
| |) | |
| VERIZON NEW ENGLAND, f/k/a |) | |
| NEW ENGLAND TELEPHONE AND |) | Docket No. 02-47 |
| TELEGRAPH COMPANY |) | |
| |) | |
| And |) | |
| |) | |
| NORTHEAST UTILITIES SERVICE COMPANY, |) | |
| d/b/a WESTERN MASSACHUSETTS |) | |
| ELECTRIC COMPANY |) | |
| |) | |
| |) | |

**OPPOSITION OF VERIZON MASSACHUSETTS TO
FIBERTECH'S MOTION TO COMPEL DISCOVERY RESPONSES
AND REQUEST FOR PROCEDURAL SCHEDULE**

Verizon Massachusetts (“Verizon MA”) hereby opposes the “Motion to Compel Discovery Responses and Request for Procedural Schedule” filed by Fiber Technologies Networks (“Fibertech”). As grounds for this opposition, Verizon MA states that the motion is premature, in that discovery has not opened and may never open in this matter. Rather, the Department should dismiss Fibertech’s Complaint because it is patently without merit, fails to support its allegations with detailed facts as required by the Department’s regulations, and was not filed in good faith but is merely unreasonable and unjust retaliation against Verizon MA and Western Massachusetts Electric Company (“WMECO”) for suing Fibertech in state court to stop its unlicensed attachments to a significant number of poles in violation of Massachusetts law and

the terms of the parties' Aerial License Agreements. As further grounds for this opposition, Verizon states the following:

Fibertech's motion is not authorized by any regulation or procedure of the Department. The regulations applicable to this pole attachment dispute, 220 CMR 45.00 et seq., do not provide for discovery unless and until a party requests "and is granted" a hearing. *See* 220 CMR 45.06(1). Unless and until the Department grants a hearing on this matter and establishes a schedule and scope for its investigation, discovery is not open and a motion to compel is premature. The regulation at 220 CMR 1.06(c)(3), relied on by Fibertech, in fact supports Verizon MA's position. Section 1.06(c)(3) makes clear that any response to a discovery request served before the commencement of a formal hearing procedure is strictly voluntary, and thus cannot be compelled. Accordingly, the Department should deny the motion, if it chooses to act on it.

The Department need not address the motion, however, but should instead dismiss Fibertech's Complaint, as Verizon MA has requested in its Answer. The record clearly shows that Fibertech brought this complaint against Verizon MA and WMECO for seeking (and later obtaining) a court order enjoining Fibertech from illegally attaching its facilities to Respondents' poles in Western Massachusetts. The timing of Fibertech's Complaint is illuminating. Although the gist of the Complaint is that Verizon MA and WMECO persistently delayed Fibertech's pole and conduit applications *for the last two years*, at no time during that period did Fibertech complain to either the Department or a court to address the conduct it alleges caused it such grievous harm. Only after Verizon MA sued Fibertech in Superior Court on August 8, 2002 did Fibertech file its Complaint with the Department, on August 13, which not coincidentally is the same day that WMECO filed suit against Fibertech.

Fibertech's bad faith is further evidenced by its recent attempt to add Massachusetts Electric Company ("MECO") as a respondent in this proceeding. Fibertech's Complaint of August 13 asserts no claim against MECO. On September 18, 2002, however, MECO brought a civil action against Fibertech in Hampden County Superior Court, seeking relief similar to that sought earlier by Verizon MA and WMECO – an injunction ordering Fibertech to remove the fiber it had illegally attached to MECO's poles. Not surprisingly, Fibertech responded within days by filing with the Department a Motion to Amend its Complaint, suddenly claiming that MECO too had allegedly engaged in the same practices of delay and inflating make-ready costs previously alleged only against Verizon MA and WMECO. The fact is that Fibertech has no legitimate claims against any Respondent but has filed its Complaint to dissuade these pole owners from prosecuting their suits to stop Fibertech's illegal trespass and enforce the orderly administration of their poles.

Furthermore, the Complaint lacks any merit, and offers no factual support for its raft of accusations. The Department's regulations at 220 CMR 45.04 require that a Complaint must include all of the facts, data and information supporting the allegations therein. 220 CMR 45.04(2)(e) requires that,

. . . in any case where it is claimed that a complainant has been improperly denied access to a pole, duct [or] conduit, . . . the complaint shall include the data and information necessary to support the claim, including . . .
2. The basis for the complainant's claim that the denial of access is improper . . . [and] 5. A copy of the utility's response to the complainant's written request, including all information given by the utility to support its denial of access."

Fibertech's Complaint contains no such data or information. Indeed, Fibertech provides no factual support for any of its claims. For example, Fibertech alleges that "in almost every case Verizon unlawfully failed to respond in any manner [to Fibertech's applications for poles in

the Springfield area] within the 45-day time period, and in many cases have [sic] failed to grant or deny access to this date.” Complaint ¶16. Fibertech goes on to claim that such delays “have been on-going for more than two (2) years in some instances.” *Id.* Although Fibertech has filed copies of some (but by no means all) of its pole applications, it has offered no correspondence, documents or other data showing when Verizon MA initially responded to these requests. Nor has it bothered to identify any particular applications that Verizon MA allegedly delayed or state the dates of any such delay. Additional examples of Fibertech’s failure to file any information in support of its claims are the following:

? Fibertech claims that Verizon MA “Established a multi-step scheme of delays, with a delay of at least 30 days at each step of the Process . . .,” Complaint ¶18(b), but offers no information describing the steps of the alleged scheme or showing that Verizon MA in fact delayed any application at all, never mind for 30 days at each step.

? Fibertech alleges that Verizon MA threatened “to delay make-ready work unless Fibertech agreed to sign a new pole agreement with Verizon . . .,” Complaint ¶18(d), but Fibertech has not filed the alleged proposed agreement or any document concerning the alleged agreement, the alleged threat or Fibertech’s response to either of them.

? Fibertech alleges that Verizon MA issued make-ready estimates “[r]equiring Fibertech to pay all costs to correct pre-existing safety violations . . .” Complaint ¶19(a). Nowhere, however, does the Complaint offer data showing that: (1) a Verizon MA make-ready estimate included work to correct a pre-existing safety condition; (2) Fibertech brought that fact to Verizon MA’s attention; or (3) that Verizon MA nevertheless insisted that Fibertech pay for the correction.

? In ¶¶19(b) and (c) of the Complaint, Fibertech alleges that Verizon MA has allowed other attachers to use extension arms and box poles in the Springfield area. Fibertech has not identified any particular pole on which either of these conditions exist, nor has it offered any information showing the date the improper attachment was made, that Verizon MA was aware of the condition or that Verizon MA knowingly licensed an attacher to utilize such improper attachment techniques.

The enormous Appendix Fibertech filed with its Complaint does not remedy the fatal factual deficiencies of the Complaint. For the most part, the Appendix is nothing more than an undifferentiated mass of pole and conduit applications, make-ready estimates and miscellaneous

documents, and it conveys no meaning. Nothing in the Appendix demonstrates that Verizon MA's make-ready charges were anything other than reasonable and appropriate. Nothing in the Appendix demonstrates that Verizon MA delayed processing any Fibertech application. Indeed, the most notable aspect of the Appendix is that it does not appear to contain a single letter, memo or other document in which Fibertech questions specific charges or takes issue with the manner in which a specific attachment application was being processed, at any time prior to illegally attaching its fiber on hundreds of Verizon's poles in June of 2002.

In sum, Fibertech's Complaint and Motion to Compel are completely without merit. The Complaint is unsupported by the detailed factual record that is required by the Department's regulations, and Fibertech's premature discovery requests of Verizon MA are nothing more than a fishing expedition. The Department should not hear Fibertech's claims – unsupported as they are and asserted solely as a litigation ploy in response to Verizon MA's civil suit – but should simply dismiss the Complaint.

WHEREFORE, Verizon MA respectfully requests that the Department dismiss Fibertech's Complaint or, in the alternative, deny Fibertech's Motion to Compel Discovery Responses.

Respectfully submitted

Verizon New England, Inc.,
d/b/a Verizon Massachusetts

By its attorneys,

/s/Alexander W. Moore
Bruce P. Beausejour
Keefe B. Clemons
Alexander W. Moore
185 Franklin Street
Boston, MA 02110
(617) 743-2265

Dated: October 4, 2002